

*Lozano vs. Alvarez*

Hague Convention cases are always fact-intensive, but understanding the legal framework background is essential. A good place to start to refresh one's understanding is *Mozes v. Mozes* (2001) 239 F.3d 1067 [2001 Cal Fam Law Report (March 2001) p. 59] in which Circuit Judge Alex Kozinski interpreted, in a case of first impression in the Ninth Circuit, the term "habitual residence" in the Hague Convention on the Civil Aspects of International Child Abduction.

In *Lorenzo v. Alvarez*, the factual scenario involved parents originally from Columbia; the parents and child lived in London until the mother and child left to relocate in New York. The U.S. District Court denied father's Hague Convention Petition to have the child returned to Great Britain for disposition by a U.K. Court. In affirming the trial court's analysis and holding, the Second Circuit held that while District Courts retain discretion to order return of a relocated and well-settled child to his or her country of habitual residence, the "now settled" defense available under Article 12 of the Hague Convention is not subject to equitable tolling. The Second Circuit opinion determined that while an abducting parent's conduct may be taken into account when deciding whether a child is "settled" in his or her new environment, the one year period in Article 12 of the Hague Convention is not subject to equitable tolling, i.e., the Article 12 one year period is not to be tolled until the time petitioner reasonably could have learned of his child's whereabouts.

The Second Circuit acknowledged that three sister Circuits (Fifth, Ninth, and Eleventh) have permitted the one year period in Article 12 to be equitably tolled, but the Second Circuit distinguished those cases and refused to follow their dictates.

Another aspect of the Second Circuit opinion is noteworthy and interesting. Immigration reform concerns not only occupy current political headlines, but increasingly infiltrate complex legal issues. In this case, it was clear that while the mother and child entered the United States from Great Britain legally, they exceeded their 90 day Visa period and remained in the United States illegally. Petitioner-father argued that the District Court gave insufficient weight to the child's unlawful status, but the Second Circuit held that the relevance and importance of a child's immigration status can and will vary for numerous reasons, and the weight given to a child's immigration status cannot be decided without balancing a variety of factors which may not support the same determination. Given this child's psychiatric history and fragility, the trial court's focus on the near future rather than long-term interest was particularly appropriate in this case.

It is becoming increasingly apparent that globalization of society and the transient nature of parents and children are leading to international Hague Convention disputes of increasing frequency. Detailed analysis of the particular factual context viewed within the technical rules of

the Hague Convention, often subject to divergent judicial interpretation, compels careful study of emerging and often conflicting judicial decisions to enable a nuanced understanding of this important area of law.

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